

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION

ROBERT FREILICH and VALERIE	§	CV. NO. 5:12-CV-577-DAE
FREILICH,	§	
	§	
Plaintiffs,	§	
	§	
vs.	§	
	§	
GREEN ENERGY RESOURCES,	§	
INC., and JOSEPH MURRAY,	§	
	§	
Defendants.	§	
	§	
	§	

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ORDER: (1) ADOPTING MEMORANDUM AND RECOMMENDATION;  
(2) DENYING WITHOUT PREJUDICE MOTION FOR CONTEMPT AND  
SANCTIONS; AND (3) ORDERING MURRAY TO SERVE ANSWERS TO  
INTERROGATORIES 4, 7, 18, 22, AND 76

Before the Court is Magistrate Judge John W. Primomo's Memorandum and Recommendation ("M&R," Dkt. # 108). On November 5, 2014, the Magistrate Judge held a hearing on the motions. Pursuant to Local Rule 7(h), this Court finds this matter suitable for disposition without a further hearing. After reviewing the Memorandum and Recommendation and the Advisories to the Court filed by Defendant Joseph Murray ("Defendant" or "Murray"), the Court **ADOPTS** the Memorandum and Recommendation (Dkt. # 108), thereby **DENYING** Plaintiffs' Motion for Contempt and Sanctions (Dkt. # 89).

Additionally, the Court **ORDERS** Murray to serve answers to interrogatories 4, 7, 18, 22, and 76.

### BACKGROUND

The case arises out of alleged misrepresentations made by and on behalf of Green Energy Resources (“Green Energy”) regarding its corporate operations and activities. (“Compl.,” Dkt. # 1 at 3–4.) Relying on the statements of Green Energy, Plaintiffs spent over \$89,523.03 toward the purchase of Green Energy stock between May 2006 and June 2010. (Id. at 5.) Plaintiffs maintain that, had the statements and representations of Green Energy’s activities been truthful, they would have not made those investments. (Id.) According to Plaintiffs, on June 22, 2010, the United States Securities and Exchange Commission (“SEC”) suspended trading in Green Energy securities and Plaintiffs’ stocks became worthless. (Id. at 5–6.)

On June 12, 2012, Plaintiffs filed suit against Green Energy, its president Joseph Murray, (“Murray”) and its legal counsel Jack Halperin<sup>1</sup> (“Halperin”). (Compl.) The Complaint asserts causes of action against all three parties for breach of fiduciary duty, negligent misrepresentation, fraud, constructive fraud, and violations of Texas Business and Commerce Code Section

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<sup>1</sup> On April 17, 2014, the Court granted Plaintiffs’ Agreed Motion to Dismiss Halperin, thereby dismissing Halperin from the suit. (Dkt. # 86.)

§ 27.01. (*Id.* at 8–14.) Plaintiffs also assert claims against Halperin and Murray under Section 20(a) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78t(a), and against Green Energy under Section 10(b) of the same Act, 15 U.S.C. § 78j(b). (*Id.* at 6–8.) Plaintiffs seek actual, consequential, and exemplary damages; pre- and post-judgment interest; rescission of Plaintiffs’ purchases of Green Energy stock; and attorney’s fees. (*Id.* at 16.) Plaintiffs also ask the Court to impose a constructive trust on the assets obtained by Defendants in connection with the deceptive practices in which Plaintiffs allege the Defendants engaged. (*Id.* at 15–16.)

On August 10, 2012, Halperin filed an Answer and Cross-Claims against Green Energy Resources and Murray for indemnification. (Dkt # 19.) On August 30, 2012, Murray filed an Answer to the Complaint. (Dkt. # 23.)

On October 11, 2012, the Court granted Green Energy defense counsel’s Motion to Withdraw. (Dkt. # 31.) On October 15, 2012, Green Energy and Murray filed a joint Answer to Halperin’s cross-claims. (Dkt. # 32.) However, because the Answer was filed on behalf of Green Energy by Murray himself, acting pro se, and the Court advised Murray that a corporation cannot appear pro se in federal court, the Court struck Green Energy’s Answer. (Dkt. # 33.) The Court reminded Green Energy that it was required to obtain counsel and warned Green Energy that if it failed to make an appearance through licensed

counsel by November 10, 2012, an entry of default would be entered against Green Energy. (Id.)

On June 5, 2013, Plaintiffs filed a Motion for Default Judgment, asking the Court to enter default judgment against Green Energy and award Plaintiffs damages. (Dkt # 41.) On July 1, 2013, following Green Energy's failure to appear at a show cause hearing, the Court entered default against Green Energy and ordered Green Energy to pay Plaintiffs damages. (Dkt. # 48.)

Shortly thereafter, on July 1, 2013, Plaintiffs filed their initial motion to compel disclosures and for sanctions, complaining that Murray and Halperin had failed to serve the disclosures required under Federal Rule of Civil Procedure 26(a)(1) and this Court's scheduling and docket control order. (Dkt. # 50.) On July 9, 2013, Plaintiffs served on Green Energy, by and through its president and co-defendant Murray, Plaintiffs' First Rule 69 Post Judgment Interrogatories pursuant to Federal Rules of Civil Procedure 69 and 33. (See Dkt. # 61 at 3.) When Green Energy, by and through Murray, failed to respond to the post-judgment interrogatories, Plaintiffs filed a second motion to compel on August 28, 2013, seeking an order to compel post-judgment interrogatories and sanctions against Murray. (Id. at 1.)

On August 6, 2013, the Magistrate Judge granted Plaintiffs' initial motion to compel disclosures as to Murray, ordering Murray to provide his initial

disclosures and a \$500 sanction by August 20, 2013. (Dkt. # 55 at 2.) On September 18, 2013, Murray filed a pro se advisory to the Court, stating that he had taken a temporary job in New Jersey in May and his mail was not forwarded. (Dkt. # 62.) He stated that upon his return to San Antonio on September 6, 2013, he contacted opposing counsel, Ron Armstrong (“Armstrong”), and agreed to provide the necessary documentation at his deposition. (Id.) Accordingly, Murray requested that the Magistrate Judge rescind the August 6, 2013 order. (Id.)

On November 6, 2013, the Magistrate Judge granted Plaintiffs’ second motion to compel against Murray, ordering Murray to serve Plaintiffs answers to the post-judgment interrogatories within seven days of the order and issuing sanctions in the amount of the reasonable expenses that Plaintiffs incurred in preparing the motion. (Dkt. # 63.) The Magistrate Judge ordered Plaintiffs to submit an affidavit regarding their expenses, which they timely filed showing expenses in the amount of \$750. (Id.; Dkt. # 65.) The Magistrate Judge also denied Murray’s request to set aside the first order to compel and sanction. (Dkt. # 63.) The Magistrate Judge advised Murray that continued failure to comply with the Court’s orders would result in imposition of further sanctions, up to and including a finding that he be held in contempt of court and incarcerated until he fully complied. (Id.)

On July 24, 2014, Plaintiffs filed a motion to hold Murray in contempt and for sanctions, stating that Murray had failed to comply with the November 6, 2013 order and instead had mailed Armstrong “a stack of irrelevant documents that were wholly non-responsive” to the required initial disclosures or the post-judgment interrogatories. (Dkt. # 89.) Plaintiffs further contend that Murray has never submitted to a deposition as he promised in his September 2013 letter and December 2013 teleconference with Armstrong. (Id.)

On July 31, 2014, Murray submitted an advisory to the Court stating that he was unable to comply with any order because he had no financial ability to do so. (Dkt. # 92.) On August 22, 2014, Murray submitted an advisory to the Court enclosing his 2012 and 2013 tax returns and stating that his projected 2014 income was \$12,000. (Dkt. # 93.) On October 29, 2014, Murray submitted an advisory to the Court enclosing a letter stating that he had filed a bankruptcy case in the Eastern District of New York that day. (Dkt. # 95.) The bankruptcy case remains open. In re Murray, No. 8-14-74889-las (Bankr. E.D.N.Y. 2014).

On November 4, 2014, the Magistrate Judge ordered that Murray appear on November 26, 2014, to show cause as to why he should not be held in contempt and incarcerated. (Dkts. ## 96, 97.) Notice was sent to Murray’s address on file in San Antonio, as well as to the address provided in his bankruptcy case. (Dkts. ## 98, 99, 102.) Additionally, an attempt was made to contact Murray

by phone at the number provided in his bankruptcy case; a voice message was left advising Murray of the date and time of the hearing. (Dkt. # 108 at 6.)

On November 26, 2014, Murray called to advise the Magistrate Judge that he had just received notice of the hearing and would not be able to attend. (Id.) The Magistrate Judge placed Murray under oath and proceeded with the hearing, permitting Murray to participate over telephone. (Id.) On November 27, 2014, Murray wrote the Court to argue that there was no fraud in this case, that he was financially unable to comply with the court-ordered sanctions, and maintaining that he had never received any copies of interrogatories. (Dkt. # 114.)

On December 1, 2014, Plaintiffs' counsel filed an affidavit attesting that, although the certified mail receipt of the hearing notice was returned signed but undated, the United States Postal Tracking System information indicated that the notice was delivered on November 21, 2014, five days before Murray indicated that he received notice. (Dkt. # 107.)

On December 5, 2014, the Magistrate Judge issued its Memorandum and Recommendation on Plaintiffs' Motion for Contempt and Sanctions (Dkt. # 89). (Dkt. # 108.) The Magistrate Judge enclosed a copy of the post-judgment interrogatories for Murray's reference. (Id., Ex. 1.) That day, the Court mailed the Memorandum and Recommendation to Murray's New York address. (Dkt. # 109.)

On December 11, 2014, Murray wrote to the Court (“Contempt Letter”), enclosing a bank statement for 2014 deposits, stating that his projected 2014 income is \$15,000, and stating that he has no capacity to pay fines. (Dkt. #112.) Murray also argues that he made every effort to comply with the orders and has sent every document in his possession. (*Id.*) On the same day, he sent a second letter (“Interrogatory Letter”), in which he enclosed a copy of the post-judgment interrogatories and handwritten responses to some of the questions. (Dkt. # 113.)

#### LEGAL STANDARD

Any party may contest the Magistrate Judge’s findings by filing written objections within fourteen days of being served with a copy of the Memorandum and Recommendation. 28 U.S.C. § 636(b)(1)(C). The objections must specifically identify those findings or recommendations that the party wishes to have the district court consider. Thomas v. Arn, 474 U.S. 140, 151 (1985). A district court need not consider “[f]rivolous, conclusive, or general objections.” Battle v. U.S. Parole Comm’n, 834 F.2d 419, 421 (5th Cir. 1987) (quoting Nettles v. Wainwright, 677 F.2d 404, 410 n.8 (5th Cir. 1982), overruled on other grounds by Douglass v. United States Auto. Ass’n, 79 F.3d 1415 (5th Cir. 1996)).

The Court must conduct a de novo review of any of the Magistrate Judge’s conclusions to which a party has specifically objected. See 28 U.S.C.

§ 636(b)(1)(C) (“A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made.”). On the other hand, findings to which no specific objections are made do not require de novo review; the Court need only determine whether the Memorandum and Recommendation is clearly erroneous or contrary to law.

United States v. Wilson, 864 F.2d 1219, 1221 (5th Cir. 1989).

### DISCUSSION

In their Motion for Contempt and for Sanctions, Plaintiffs request that the Court (1) incarcerate Murray until he responds to the interrogatories, and (2) award sanctions to Plaintiffs for the expenses incurred in preparing the motion. (Dkt. # 89.) In his Memorandum and Recommendation, the Magistrate Judge concluded that Plaintiffs’ Motion should be denied subject to being reurged should Murray, as president of Green Energy, fail to comply in full with the Court’s order. (M&R at 11.) The Magistrate Judge further recommended that Murray be ordered to serve Plaintiffs answers to the post-judgment interrogatories within 10 days of the Court’s order. (Id. at 10–11.) Finally, the Magistrate Judge recommended that the case be administratively closed as to Murray in his individual capacity, until such time as the bankruptcy court lifts the automatic stay on Murray’s personal bankruptcy case. (Id. at 11.)

I. Contempt and Interrogatories

In the Memorandum and Recommendation, the Magistrate Judge concluded that Murray should not be held in contempt because Murray has presented evidence regarding his inability to respond and/or his defense for failing to comply with the Court's orders. (M&R at 10.) Because neither party objects to this finding, the Court reviews the finding for clear error.

“In a civil contempt proceeding, the party seeking an order of contempt need only establish (1) that a court order was in effect, and (2) that the order required certain conduct by the respondent, and (3) that the respondent failed to comply with the court’s order.” F.D.I.C. v. LeGrand, 43 F.3d 163, 170 (5th Cir. 1995). Once the moving party shows that the respondent has failed to comply, “the burden shifts to the respondent to rebut this conclusion, demonstrate an inability to comply, or present other relevant defenses.” Id.

Here, the Magistrate Judge found that Murray failed to respond to the Court’s orders compelling responses to the post-judgment interrogatories and sanctions. (M&R at 10.) However, the Magistrate Judge found that Murray had produced sufficient evidence in defense of his failure to comply: namely, that he did not recall receiving the interrogatories and that he attempted to comply by providing opposing counsel and the Court with his tax returns and other documents. (Id.) This finding was neither clearly erroneous nor contrary to law,

and the Court therefore **ADOPTS** the Magistrate Judge's recommendation on the contempt issue.<sup>2</sup>

Because of the defenses that Murray presented, the Magistrate Judge also recommended that Murray should be ordered again to serve the interrogatories in compliance with Rule 33. (*Id.*) In his Interrogatory Letter, Murray replies that all documents in his and Green Energy's possession were sent to Armstrong in 2013, and any other documents were sent to the SEC at their direction in June

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<sup>2</sup> The Court notes that the state of the law is unclear as to whether a contempt action against Murray, for his failure to comply with the post-judgment interrogatories served through him to Green Energy, is also subject to the automatic stay. Although the default judgment was against Green Energy as a corporation, which is an entity distinct from Murray for the purposes of the action (see Dkt. 70 at 12–13), the contempt action is against Murray in his individual capacity. Accordingly, it fits within the automatic stay's prohibition, unless contempt proceedings are exempted. See 11 U.S.C. § 362(a).

Civil contempt proceedings are not explicitly exempted from the automatic stay under 11 U.S.C. § 362. Accordingly, some courts require that any civil contempt proceeding against a party in bankruptcy be stayed. See, e.g., In re Wiley, 315 B.R. 682, 687 (Bankr. E.D. La. 2004) (citing In re Maloney, 204 B.R. 671, 674 (Bankr. E.D. N.Y. 1996)). Other courts, however, consider civil contempt proceedings exempt if their purpose is to “uphold the dignity of the court,” rather than to enforce payment of a judgment. See, e.g., S.E.C. v. Bilzerian, 131 F. Supp. 2d 10, 15 (D.D.C. 2001) (citing US Sprint Commc'ns Co. v. Buscher, 89 B.R. 154 (Bankr. D. Kan. 1988); N.L.R.B. v. Sawulski, 158 B.R. 971, 977 (Bankr. E.D. Mich. 1993)).

Because the state of the law is unclear and the Magistrate Judge found that the motion for contempt should be denied, there is no clear error here. However, the Court notes that, if a bankruptcy court finds that a party commencing an action against a party in bankruptcy has known of the existence of the stay and acts intentionally in ways that violate the stay, that party can owe damages to the party in bankruptcy. 11 U.S.C. § 362(k)(1); In re Repine, 536 F.3d 512, 519 (5th Cir. 2008).

2010. (Dkt. # 113.) The Court construes this as an objection to the Magistrate Judge's conclusion that Murray must serve the interrogatories, and therefore reviews the interrogatory issue de novo.<sup>3</sup>

Federal Rule of Civil Procedure 33 requires that the responding party "serve its answers . . . within 30 days after being served with the interrogatories." Fed. R. Civ. P. 33(b)(2). The responding party must separately and fully answer each interrogatory in writing under oath. Fed. R. Civ. P. 33(b)(3). The responding party may, in cases where the question can be answered by examining a party's business records and the burden of ascertaining the answer is substantially the same for all parties, answer by providing business records. Fed. R. Civ. P. 33(d). However, in addition to providing the documents, the responding party must specify the particular records that must be reviewed with respect to each interrogatory. *Id.*

In lieu of an answer, a party can submit an objection; however, that objection must be stated with specificity in response to each contested discovery request. Fed. R. Civ. P. 33(b)(4); McLeod, Alexander, Powel & Apffel, P.C. v. Quarles, 894 F.2d 1482, 1485 (5th Cir. 1990) ("the 'party resisting discovery' 'must show specifically how . . . each interrogatory is not relevant or how each question

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<sup>3</sup> Because Murray is pro se, the Court must liberally construe his filings. See Haines v. Kerner, 404 U.S. 519, 520–21 (1972); Windland v. Quarterman, 578 F.3d 314, 316 (5th Cir. 2009) (noting the "well-established precedent requiring that [the court] construe pro se briefs liberally").

is overly, broad, burdensome or oppressive’’’). If a party fails to adequately answer a Rule 33 interrogatory, the party seeking discovery may move for an order compelling an answer. Fed. R. Civ. P. 37(a)(3)(B)(iii).

To the extent that Murray’s Interrogatory Letter objects to the Magistrate Judge’s findings on the basis that he has already supplied all of the documents in his possession to Armstrong, Murray’s objection fails. Although a responding party can provide documents in response to interrogatories, the responding party must clearly identify which documents are responsive to which requests. Merely mailing an attorney assorted paperwork is insufficient to meet the requirements of Rule 33.

There is no evidence on the record that Murray, prior to the Magistrate Judge’s Memorandum and Recommendation, had ever served on Plaintiffs responses and/or objections to the post-judgment interrogatories. However, enclosed with the Interrogatory Letter was a copy of the post-judgment interrogatories with handwritten and notarized responses, often incomplete, to some of the interrogatory requests. (Dkt. # 113, Ex. 1.) Although the Court recognizes Murray’s attempt to comply with Rule 33, some responses remain insufficient. Murray has failed to fully answer several interrogatories. For instance, Murray provides no response to interrogatory 4. (Dkt. 113, Ex. 1 at 8.) In response to the request 7, “Please name each state in which the corporation does

business,” Murray replies only, “Inc in New York.” (*Id.*) In response to request 18, which asks for the full name, complete address, office title, date of selection, and date of termination of every officer and former officer of the corporation, Murray states that Jack Halperin was “secretary as registered agent,” but provides no additional information. (*Id.* at 10.)

In response to interrogatory 22, which requests the name and complete address for any entity to which the corporation exhibited a statement of its financial condition and the contents of that statement, Murray states only “Pink sheets 2004–2009” and “sent to SEC 2010.” (*Id.* at 11.) Similarly, in response to interrogatory 76, which requests the name and complete address for any entity to which the corporation furnished a financial statement, the date it was furnished, and the reason it was prepared, Murray states only “Pinksheets.com 2004–2009.” (*Id.* at 29.)

Accordingly, the Court finds that Murray has still failed to comply with the requirements of Rule 33 for interrogatories 4, 7, 18, 22, and 76, despite having submitted a notarized copy of some responses to the post-judgment interrogatories as an enclosure with his Interrogatory Letter.

Accordingly, the Court **ADOPTS** the Magistrate Judge’s recommendation ordering Murray to serve Plaintiffs answers to the post-judgment interrogatories with respect to interrogatories 4, 7, 18, 22, and 76. The Court

advises Murray that each aforementioned interrogatory must be answered separately and fully, in writing under oath, signed, and without objections, regardless of whether Murray believes he has previously responded to these same interrogatories in whole or in part.

The Court **ORDERS** that Murray serve Plaintiffs answers to the aforementioned interrogatories within twenty (20) days of the signing of this Order. The Court advises Murray that proper service for discovery purposes requires him to serve Plaintiffs by mail to the address on file, which, in this case is to the attention of Ronald Armstrong, II, The Armstrong Firm, PLLC, 110 Broadway, Suite 444, San Antonio, Texas 78205.

## II. Monetary Sanctions

In the Memorandum and Recommendation, the Magistrate Judge concluded that the Court cannot impose additional sanctions for the preparation of the Motion for Contempt and Sanctions due to the automatic bankruptcy stay protecting Murray's estate. (*Id.*) Because no party objects to this finding, the Court reviews for clear error.

Under 11 U.S.C. § 362, when a party commences a bankruptcy action, an automatic stay prevents any entity—including the court—to collect claims owed that arose prior to the commencement of the bankruptcy action. Accordingly, the Magistrate Judge did not clearly err in finding that imposition of sanctions against

Murray were improper at this time, and the Court **ADOPTS** the Magistrate Judge's recommendation denying sanctions.<sup>4</sup>

### III. Case Against Murray

Finally, the Magistrate Judge recommends administratively closing the case against Murray in his individual capacity until such time as the bankruptcy court lifts the automatic stay on Murray's personal bankruptcy case. Because no party objects to this finding, the Court reviews for clear error.

When a district court administratively closes a case, that action is equivalent to a stay. CitiFinancial Corp. v. Harrison, 453 F.3d 245, 250 (5th Cir. 2006). The case can be reopened upon the request of the parties or the court's own motion. *Id.* Because the proceeding against Murray in his individual capacity is a non-exempt proceeding under 11 U.S.C. § 362, it is subject to the automatic stay pending the resolution of Murray's bankruptcy case. Accordingly, the Court **ADOPTS** the Magistrate Judge's recommendation that the Court administratively close the case as to Murray in his individual capacity.

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<sup>4</sup> Murray's Contempt Letter objects to the initial imposition of sanctions, on the basis that he has no capacity to pay fines and that he has complied with the Court's orders to the best of his ability. (Dkt. # 112.) To the extent that Murray objects on the basis that the Magistrate Judge failed to set aside the August and November 2013 sanctions, this matter is not properly before the Court. Murray must—and has already—separately move for the Court to set aside orders to compel and for sanctions.

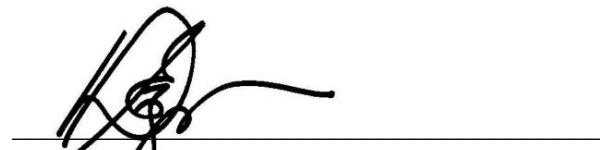
**CONCLUSION**

For the aforementioned reasons, the Court **ADOPTS** the Magistrate Judge's Memorandum and Recommendation (Dkt. # 108), thereby **DENYING WITHOUT PREJUDICE** Plaintiffs' Motion for Contempt and Sanctions (Dkt. # 89). Additionally, the Court **ADOPTS** the Magistrate Judge's recommendation ordering Murray to serve Plaintiffs answers to the post-judgment interrogatories with respect to interrogatories 4, 7, 18, 22, and 76. The Court advises Murray that each aforementioned interrogatory must be answered separately and fully, in writing under oath, signed, and without objections, regardless of whether Murray believes he has previously responded to these same interrogatories in whole or in part.

The Court **ORDERS** that Murray serve Plaintiffs answers to the aforementioned interrogatories within twenty (20) days of the signing of this Order. The Court advises Murray that proper service for discovery purposes requires him to serve Plaintiffs by mail to the address on file, which, in this case is to the attention of Ronald Armstrong, II, The Armstrong Firm, PLLC, 110 Broadway, Suite 444, San Antonio, Texas 78205.

**IT IS SO ORDERED.**

**DATED:** San Antonio, Texas, March 27, 2015.



David Alan Ezra  
Senior United States District Judge